

The Spoor Law: An Anachronism or Constitutional Misfit?

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ABSTRACT

The spoor law is a rule of African customary law that determines liability for stock theft. It provides that, if the tracks of lost or stolen livestock can be traced to a homestead or its immediate surrounds, the head of that establishment will be held liable. If the direction of the spoor do not point to a specific homestead, all those in the vicinity become jointly liable. As a convenient deterrent to the theft of livestock, the spoor law was incorporated into the laws of the Cape Province, Natal and the Transkeian Territories at the end of the nineteenth century, making it the only rule of customary law to be applicable without regard to race prior to the new Constitution. This article questions whether the spoor law still is, and should be, part of South African law. It has never been formally repealed, and still survives in the 1983 Transkei Penal Code. Although the law has not been mentioned in a reported case for many years, it might play a valuable role in crime control, since stock theft remains a serious and pervasive crime in South Africa. The article argues, however, that it will probably not survive constitutional review, because it has the effect of imposing a reverse onus of proof.

1. Introduction

The spoor law is a rule of African customary law, which, in the past at least, was regularly applied in various parts of Southern Africa, notably the Transkei,¹ Natal and Zululand.² In broad terms, the law was a method for determining the liability arising from theft of livestock. While generally associated with cattle – always the prize

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¹ In 1878, for instance, there is evidence of the practice of spoor law in the Idutywa District: Cape Government Commission on *Native Laws and Customs* 1883 (I) at 94, 362 and 466. This work is cited in a useful book by DS Koyana *The Influence of the Transkei Penal Code on South African Criminal Law* (1992) 57.

² EJ Krige *Social System of the Zulu* (1962) 229. See, too, section 6 of the Cattle Stealing Law 10 of 1876 (Natal).

target of stock thieves³ – the spoor law could be invoked for theft of other types of stock or, according to two cases, even ordinary items of property.⁴

The spoor law provided that, if the tracks⁵ of missing livestock could be traced to a homestead or its immediate surrounds – a figure of 500 or 600 yards is often given – the head of that establishment would be held liable.⁶ To avoid liability he had to give a satisfactory explanation for the stock or assist in furthering the search. When he could show that the tracks continued past his establishment, his duty was obviously discharged, but, if he refused to further the search, he would be considered guilty of theft and ordered to make recompense.⁷ If the direction of the spoor did not point to a specific homestead, all those in the immediate vicinity became jointly liable.⁸

The 'spoor' did not necessarily have to be the imprint of hooves. Other evidence of the presence of stock in the area sufficed.⁹ For instance, a rule (that may have been peculiar to Xhosa-speakers) provided that if, during a house-to-house search, meat was found concealed on the premises, the head of that establishment would be required to prove that it was not from the missing beast. In other words, he had to explain the spoor (*ukugqithisa umkhondo*), failing which, he would be held liable for the value of the beast.¹⁰

³ Because of their social, economic and religious significance in the cultures of Southern Africa, see Krige op cit (n2) 185-187; MH Wilson *Reaction to Conquest* 2ed (1964) 68-70; HO Mönning *The Pedi* (1967) 163ff; H Kuper *An African Aristocracy* (1961) 36 and 150-152; EJ Krige & JD Krige *The Realm of a Rain Queen: A study of the pattern of Lovedu society* (1943) 44.

⁴ *Nkhuede v Mafunda* 3 NAC 266 (1913) and *Matyeni v Smayile* (1936) NAC (C & O) 30. The Cape Government Commission op cit (n1) at 26, however, suggested that the rule should be limited to only stock theft. AJ Kerr *The Customary Law of Immovable Property and Succession* 3ed (1990) 82 says that the term 'spoor law' came about because most cases of theft in the nineteenth century concerned livestock.

⁵ *The Queen v M'Balo* (1891-1892) 9 SC 379 at 381, however, held that the finding of a carcass of a dead animal was analogous to finding its spoor. See also *Tyaliti and Others v Sindiwe* 1 NAC 158 (1907).

⁶ Koyana op cit (n1) 58-59; GMB Whitfield *South African Native Law* 2ed (1948) 258, 481 and 483; Kerr op cit (n4) 82-83. See also *M'Balo's case* supra (n5) at 379-380; *Tyaliti and Others v Sindiwe* 1 NAC 158 (1907); *Bakqana v Kesler* 1933 EDL 50 at 52-53 and *Matyeni v Smayile* 1936 NAC (C & O) 30.

⁷ Even though the identity of the actual thief was not determined: Koyana op cit (n1) at 58 (footnotes omitted).

⁸ See *Bakqana* supra (n6) at 55, where liability was joint, not joint and several. See further, Whitfield op cit (n6) 483 and *Bakqana* supra (n6) at 59-60.

⁹ See Kerr op cit (n4) 82 and Whitfield op cit (n6) 483.

¹⁰ 'The effect of this is to make every Native living in his tribal state a detective, and thus an inexpensive substitute for a police force will be continued throughout the Territories': Cape Government Commission op cit (n1) 26.

European settlers readily adapted the spoor law to their own use. On the one hand, its implicit presumption of guilt circumvented the need to search for more direct evidence, thus providing a convenient method for recovering stock without having to comply with all the rules of colonial justice.¹¹ On the other hand, because neighbours who refused to assist in the search for lost stock became jointly liable for the offence, the spoor law was thought to have an excellent deterrent effect on anyone contemplating stock theft, which was a persistent problem in the farming communities of colonial Africa.¹²

Perhaps the most attractive feature of the law, however, was the right it gave to self-help. In this regard, of course, the law was typical of all pre-state societies, where the duty of law enforcement lay in the hands of the victim and, when possible, spread to the wider community. In early English law, for example,

‘When a crime has been discovered the natural thing to do is to call for help and pursue the trail of the criminal. This is regularized as “hue and cry” and neglect to raise it is a serious matter The neighbours ought to turn out with their weapons ... and go from vill to vill [village]. The criminal who is caught as the result of hot pursuit will be dealt with summarily’¹³

Self-help was also permitted in the law of the early Roman Republic. The XII Tables¹⁴ provided that a person suspected of having committed the delict of *furtum* would be obliged to submit to a house search, either formal or informal (the former being *lance et licio*).¹⁵ If the thief was caught in the act (*furtum manifestum*), the penalties were more

¹¹ See, for example, *Matyeni v Smayile* 1936 NAC (C & O) 30; Whitfield op cit (n6) 482 and the Cape Government Commission op cit (n1) 25. Hence, the spoor law appeared in Cape Ordinance 2 of 1837, the Cattle Theft Repression Act 16 of 1864, the Stock Theft Act 35 of 1883 (Cape), the Cattle Removal Act, 14 of 1870 and the Cattle Removal Amendment Act 20 of 1889 (Cape); the Cattle Stealing Law 10 of 1876 (Natal) and articles 11 and 12 of the Conventie van Aliwal (1869) (Orange Free State).

¹² Such was the evidence by the Cape Government Commission op cit (n1) 26; Whitfield op cit (n6) 482; Chief Commissioner Warner *Mr Warner's notes* (1856) in Colonel Maclean *Laws and Customs* (1858) (new impression 1968) 68.

¹³ TFT Plucknett *A Concise History of the Common Law* 5ed (1956) 430 and Sir William Holdsworth *A History of English Law* 4ed (1936) (2) 101.

¹⁴ Table II Law IVff.

¹⁵ Whereby the complainant had to search wearing only a loin cloth and bearing a platter. See HF Jolowicz *Historical Introduction to the Study of Roman Law* (1954) 170-172. Table II Law VI: ‘When any persons commit a theft during the day and in the light ... and attempt to defend themselves with weapons ... and the party against whom the violence is committed raises the cry of thief, and calls upon other persons, if any are present, to come to his assistance; and this is done, and the thieves are killed by him in the defence of his person and property, it is legal, and no liability attaches to the homicide.’

severe, but in order to establish this situation the victim was obliged to raise an outcry.¹⁶

In general, a high degree of civic responsibility was expected in societies without a police force.¹⁷ Hence, in pre-colonial Africa, when people were encountered passing through a district with cattle, they were to be questioned about their origins, otherwise the local inhabitants would be held responsible for losses. This rule had the effect of making,

'[e]very man ... his *brother's keeper* in the eyes of the *law*, and consequently in the interests of the community each individual acquaints himself with what is afoot in the neighbourhood. It is this great principle of collective responsibility upon which the *spoor law* is founded.'¹⁸

The self-help nature of the spoor law is evident not only in this emphasis on civic responsibility but also on the implicit right of hot pursuit¹⁹ and the custom of raising a 'hue and cry', which was at one and the same time an alarm call and a call to all neighbours to join the hunt.

These antecedents in Roman and English common law suggest that, by recognising the spoor law, colonial authorities in South Africa were endorsing customs that were close to their own legal traditions. Application of the spoor law, however, encouraged a commando form of self-help,²⁰ which was a contentious issue in colonial history.²¹

¹⁶ T Wood *A New Institute of the Imperial or Civil Law* (1730) 3.7.1.

¹⁷ Although, as Holdsworth op cit (n13) 99 and 102 points out, the aim of early law was to persuade people to submit to the court and to restrict the circumstances in which they could resort to self-help. Hence, if a victim wanted to ensure that his actions would be condoned, he had to observe various formalities, such as the search *lance et licio* (house search) in Roman law or raising the hue and cry in English law.

¹⁸ Sir Jacob Barry, giving evidence for the 1883 the Cape Commission op cit (n1) 386. See South African Association for the Advancement of Science *Report of the Annual Meeting of the South African Association for the Advancement of Science* (1919) (16) 134.

¹⁹ Whereby the victims of theft could pursue offenders outside their immediate jurisdictions into neighbouring areas. As early as 1817, Lord Charles Somerset promulgated regulations permitting settler farmers to cross the border into Xhosa lands in order retrieve supposedly stolen cattle from the nearest African homesteads: As reported by TRH Davenport & C Saunders *South Africa, A Modern History* 5ed (2000) 134.

²⁰ Spoor Law was also known as the 'reprisal system': Noël Mostert *Frontiers: the epic of South Africa's creation and the tragedy of the Xhosa people* (1992) 450.

²¹ As in the Orange Free State and Eastern Cape. See H Giliomee *The Afrikaner: a biography* (2003) 131; Mostert op cit (n20) 449ff; H Giliomee & B Mbenga *The New History of South Africa* (2007) 102 and Davenport & Saunders op cit (n19) 134. See also the evidence of Rev Bryce Ross who said that great injustices were perpetrated by spoor law: Cape Government Commission op cit (n1) Appendix B, 221.

Indeed, abuse of the spoor law led to accusations that settlers were enlarging their herds at the expense of local tribes.²²

With hindsight, the decision by the colonial authorities to incorporate the spoor law into the colonial legal system seems remarkable. In the first place, this is probably the only rule of customary law to have been made part of the general law of the land.²³ In 1886, it became part of a Penal Code for the Transkeian Territories,²⁴ and, in 1899 part of statutes on stock theft for the Cape²⁵ and for Natal.²⁶ In the second place, with the exception of Natal, the spoor law was applied without regard to race.

Given the flexible and variable nature of customary law, the details of spoor law would have varied from area-to-area and from time-to-time. But, when included in colonial legislation, these differences were disregarded in favour of a standard formula purporting to represent the customs of the area. Sections 200 to 202 of the 1886 Transkei Penal Code are a good example, and, in the absence of better contemporary evidence to the contrary, these provisions will be taken as a fair reflection of the customs of the Transkeian Territories.

Under the heading *Responsibility for Value of Stolen Property under Spoor law*, the Penal Code provided that:

Section 200

'(1) ... when the spoor of any stolen animals is traced to any kraal or locality responsibility in respect of such stolen animals shall be determined as hereinafter provided; that is to say: -

- (1) The head of any kraal (*umninimzi*) shall be responsible for the value and damages of any stolen animals, the spoor of which is traced to such a kraal.
- (2) The owner of any stolen animals, the spoor of which has become lost or obliterated, has a right of search for any traces of such animal, in any hut, kraal, enclosure or lands in that neighbourhood; any person refusing to permit such a search is responsible for the value of the animal stolen.
- (3) When the owner of any animal is on the spoor of such animal, it shall be lawful for the owner to demand from the persons living in the neighbourhood all reasonable assistance in following up such spoor, and whoever neglects or refuses to give such assistance, and by such neglect

²² A Lester *Imperial Networks: creating identities in nineteenth-century South Africa* (2001) 42.

²³ Mostert op cit (n20) 449-450 and Gilliomée & Mbenga op cit (n21) 102. The deterrent effect of spoor law outweighed its various demerits: Whitfield op cit (n6) 482 and the Cape Government's Commission op cit (n1) 286.

²⁴ Transkeian Territories Penal Code 24 of 1886 (Cape). For the spoor law provisions, see below.

²⁵ Cattle Stealing Act 1 of 1889 (Cape).

²⁶ Act 1 of 1899 (Natal).

or refusal causes the loss or obliteration of such spoor, or whoever by willful obstruction or malice causes the obliteration or loss of such spoor, is liable for the value of the animal stolen.

- (4) When such spoor cannot be traced to any specific kraal or kraals, but is lost or becomes obliterated on any lands, then the responsibility for the value of such stolen animal shall devolve upon the heads (*abaninimizi*) of the kraals adjacent to and surrounding the spot where such spoor has been lost or obliterated: and for the purpose of compensating the owner of such stolen animal, it shall be lawful for the Resident Magistrate so to fix such responsibility by an assessment not exceeding two head of cattle (or their money value), to be by such Magistrate levied on each kraal, to make up the whole value, or as near as possible the whole value, of the stolen animal or animals.
- (5) Whenever a spoor is traced to, or within, the confines of any locality occupied by any kraal or kraals, or to or within any area occupied by any community or section of a tribe, if the persons occupying such kraal or kraals, or locality, or constituting such community or such section of a tribe, without lawful excuse, neglect or refuse to receive to take over and follow up such spoor, they are responsible for the value of the stolen animal whose spoor shall have been so traced, and are to be compelled to make good such value to the owner in like manner as is provided for with reference to "lost spoor" cases in the preceding sub-section.'

Section 201

'Whoever fraudulently and with intent to injure another shall create any spoor, shall be punished with a fine not exceeding fifty pounds sterling, and in default of payment with imprisonment with or without hard labour for a term which may extend to twelve months.'

Section 202

'It shall be lawful for the resident magistrate of any district, whenever any claim is made against any person or persons in respect of the spoor traced to any kraal of locality, upon request of the owner of the animal or animals stolen, or of any person authorized by such owner to inquire summarily and without pleading, but in the presence of the heads of the kraals upon whom responsibility is sought to be attached, into the circumstances of the case, and the value of the animal or animals alleged to have been stolen, together with the damage which the owner or owners shall have sustained by the loss or by the cost of search of other endeavour to recover the same, and may give judgment in favour of such owner as hereinbefore provided.'

As is apparent in the Code, the spoor 'law' was in fact a composite set of rules, although it is usually referred to as if it were only one. These rules regulated the rights and powers of the stock owner, as well as the duties and liabilities of the homesteads to which the stock had been traced. Section 200(1) subsection (1) of the Code provided for individual liability to pay compensation where the spoor could be traced to a homestead. Subsections 1(2) and (3) gave the stock owner a

right of hot pursuit,²⁷ and subsection 1(3) obliged neighbours to assist the pursuers in terms that suggested compensation (although it might also have been construed as a penalty justified by the public nature of the duty of pursuit). Subsection 1(5) obliged the head of the homestead in question to take up the pursuit. Here, the sanction for failure to comply was compensation. Where the spoor could not be traced to a specific homestead or was lost, subsection 1(4) established liability to pay compensation, which, depending on the facts of particular cases, could amount to collective liability. Section 201 created a criminal offence by penalising the laying of false spoor,²⁸ and section 202 established a process to be followed in cases of stolen stock, a process that was civil rather than criminal in nature.

It is many years since the spoor law attracted the interest of legal practitioners or academics, which is doubtless due, in part at least, to the fact that stock farming is no longer a mainstay of the South African economy. Nonetheless, theft of livestock continues to plague farmers.²⁹ For that reason only – if not the intriguing theoretical issues raised by spoor law – this article reconsiders the rule and its statutory variants. Does the spoor law still exist, and, if so, does it withstand constitutional scrutiny?

2. Continued existence of the spoor law

The continued existence of the spoor law depends on the form in which it appears. The law may appear as a series of provisions in a statute (such as the Transkei Penal Code), as a product of the so-called 'official' customary law (i.e. in cases, restatements and academic writings) or as 'living' law (i.e. the rules actually being observed by communities in the present day).³⁰

a) Survival of the statutory rule

As mentioned above, the spoor law was included in colonial legislation for the Cape, Natal and the Transkeian Territories. In 1959, a Stock Theft Act³¹ provided uniform national rules for South Africa, thereby

²⁷ Note that there is no equivalent provision in the Transkei Penal Code Act 9 of 1983 (Transkei).

²⁸ See also *Zwaartbooi v Gunjwe and Others* 3 NAC 267 (1912).

²⁹ Thamsanqa Magubane 'Stock theft spirals out of control' in *The Witness* on 6 June 2011 at 5.

³⁰ For the distinction between 'official' and 'living' customary law see: AJGM Sanders 'How customary is African customary law?' (1987) 20 *CILSA* 405.

³¹ The new rules were laid down in sections 1 to 5 of the Stock Theft Act 57 of 1959.

repealing the Cape and Natal Acts.³² No mention, however, was made of the spoor law provisions in the Transkei Penal Code.

When Transkei became an independent homeland in 1976, it began promulgating its own legislation. The Stock Theft Act of 1977³³ accordingly repealed the equivalent South African Act, but retained the former 1886 Transkei Penal Code, which thereafter had to be read in conjunction with the 1977 Act.³⁴ Six years later, Transkei enacted a new Penal Code.³⁵ Provisions of the nineteenth-century Code dealing with spoor law³⁶ were retained, although with different wording. The 1983 Code provided that:

- '151. Any person who fraudulently and with intent to injure another shall create any false spoor shall be guilty of an offence.
- 152. Whenever any claim is made against any person or persons in respect of a spoor traced to any kraal or locality, the magistrate of the district may upon the request of the owner of the animal or animals stolen, or of any person authorized by such owner, summarily and without pleading, but in the presence of the heads of the kraals upon whom responsibility is sought to be attached –
 - (a) enquire into the circumstances of the case;
 - (b) determine –
 - (i) the value of the animal or animals alleged to have been stolen;
 - (ii) the damage which the owner or owners shall have sustained by such loss; and
 - (iii) the cost of any search or other endeavour to recover the missing animal or animals; and
 - (c) fix liability for the amounts mentioned in paragraph (b) and may give judgment accordingly in favour of the owner which shall then have the effect of a civil judgment.'

In 1994, when Transkei was reincorporated into South Africa, the validity of the homeland laws had to be reconsidered so as to facilitate the territory's transition to its new status in a unitary state. The Justice Laws and Rationalisation Act repealed Part 9 of the Penal Code,³⁷ and hence, by implication, left the remainder of the enactment, including

³² Cattle Removal Act 14 of 1870 (Cape) and Act 1 of 1899 (Natal), respectively.

³³ Stock Theft Act 25 of 1977 (Transkei).

³⁴ See, for example, *Bangindawo and Others v Head of the Nyanda Regional Authority and Another*; *Hlanitlalala v Head of the Western Tembuland Regional Authority and Others* 1998 (2) SACR 16 (Tk) at 18. While similar to the South African law, the main thrust of the 1977 Act was to create a permit-based system for transporting stock.

³⁵ Transkeian Penal Code Act 9 of 1983 (Transkei).

³⁶ Transkeian Territories Penal Code 24 of 1886 (Cape) (as amended by s 1 of the Transkeian Territories Penal Code Amendment Act 41 of 1898 (Cape)).

³⁷ Schedule II of Act 18 of 1996.

the sections on spoor law, intact.³⁸ It follows that these provisions are still in operation.

Even so, the Penal Code was designed to apply only in Transkei, an entity that no longer exists. As a result, the Code will probably not survive constitutional review. In *Mhlekuwa and Feni v Head of the Western Tembuland Regional Authority and Another*, a case with direct bearing on the Penal Code, it was held that legislation restricting the jurisdiction of the Transkeian Regional Courts to Transkeian citizens and the borders of the homeland constituted an infringement of section 9 of the Constitution. In other words, application of the law constituted unfair discrimination.³⁹

As a result, it could be argued that, although sections 151 and 152 of the 1983 Transkeian Penal Code have survived the promulgation of new statutes on the subject of stock theft, they are highly unlikely to withstand constitutional scrutiny. Any legislation restricted to the citizens (or inhabitants) of a territorial entity representing the former apartheid regime is invalid, because it involves violation of the requirement of equal treatment, a fundamental principle of the South African Bill of Rights.

b) Survival of the customary rule

The non-statutory versions of the spoor law pose different problems, the most basic of which is the extent to which customary law is recognized in the South African legal system. Throughout Africa, when the European powers imposed their own systems of law on their colonies, these became the general laws of the land; the continued application of indigenous systems of customary law was an exception to the rule.⁴⁰ It was then assumed that the terms for recognizing

³⁸ The Code was most recently applied in *Ramokolo v S* (251/10) [2011] ZASCA 77, a case dealing with section 156 on extortion. See DS Koyana 'Legal Pluralism in South Africa: the resilience of Transkei's separate legal status in the field of criminal law' (2005) 26 *Obiter* 14-25 at 25 discussing the unreported Transkei Division case of *S v Xolani Bhobhotyana* 63 of 2004). 'The reasonable conclusion was that the legislature had intended the remainder of Act 9 of 1983 to apply throughout Transkei. Bearing in mind section 241(2) of the Constitution [108 of 1996] *re* the continuation of laws, the Transkei Penal Code Act would remain applicable to the exclusion of the common law until Parliament itself intervened.' Although the South African Law Reform Commission tabled a request by the Judge President of the Transkei High Court to repeal the Act (34th Annual Report (2006-2007) of the South African Law Reform Commission at 14), no action appears to have been taken.

³⁹ 2000 (2) SACR 596 (TK) at 644.

⁴⁰ W Menski *Comparative Law in a Global Context: the legal systems of Asia and Africa* (2006) 453.

customary law were not intended to include criminal matters.⁴¹ The effect of this assumption led to another: that the colonial systems of criminal law superseded and extinguished customary-law crimes so that all subjects of the state, settlers and Africans alike, were subject to the same regime.⁴²

In South Africa since 1988, however, the legislation governing the proof and application of customary law suggests a contrary interpretation. Section 1(1) of the Law of Evidence Amendment Act⁴³ provides that:

'Any court may take judicial notice of ... indigenous law in so far as such law can be ascertained readily and with sufficient certainty'

Here, the term 'indigenous law' (which is understood to mean the same as 'customary law') is defined broadly to mean the 'Black law or customs as applied by the Black tribes in the Republic or in territories which formerly formed part of the Republic'.⁴⁴ The generality of this definition clearly invites inclusion of both civil and criminal laws.

What is more, traditional courts have enjoyed a specific power, since 1955, to apply customary criminal law. By an amendment of that year to the 1927 Black Administration Act,⁴⁵ traditional rulers were allowed to adjudicate both civil and criminal claims (although not the offence of stock theft).⁴⁶ While the Black Administration Act was repealed in 2005, with effect from 31 July 2006, these provisions are still in force until a new act is promulgated for traditional courts.⁴⁷

Apart from these two enactments, customary law has enjoyed a much stronger position in South Africa's legal system since the advent of a constitutional democracy. Section 211(3) of the Constitution of the Republic of South Africa, 1996 made application of customary law

⁴¹ Policy in post-colonial Africa has been equally ambiguous. See C Anyangwe 'The whittling away of African indigenous legal and judicial system' (1998) 30 *Zambia Law Journal* 46 at 52-53.

⁴² TW Bennett *Application of Customary Law in Southern Africa, the conflict of personal laws* (1985) 40.

⁴³ Act 45 of 1988.

⁴⁴ Section 1(4) of the Law of Evidence Amendment Act 45 of 1988.

⁴⁵ Sections 12(1) and 20(1)(a)(i) of Act 38 of 1927.

⁴⁶ In terms of Schedule 3 of the Black Administration Act

⁴⁷ Section 1(3) of the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005. In 2008, the Department of Justice tabled a long-awaited Traditional Courts Bill (B15-2008) which was supposed to re-establish the position of traditional courts and bring their composition and procedures into line with the Constitution. The Bill limited criminal jurisdiction to certain offences, but, this time, stock theft was not excluded. The Bill was withdrawn, however, and, until such time as a new Act comes into force, the existing courts remain in operation with their jurisdictional powers intact. In January 2012 a new bill (B1-2012) appeared, but it is much the same as its predecessor.

mandatory in all the courts of the land 'when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'.⁴⁸

As it happens, the customary-law versions of the spoor law – as opposed to the statutory equivalents – have never been *specifically* repealed. Even so, it might be argued that the customary laws were repealed by the enactment of legislation containing provisions the same as or contrary to customary law. The most likely candidate would be the national Stock Theft Act of 1959,⁴⁹ which regulates most matters concerned with theft of livestock. However, it makes no mention of rules similar to the spoor law. When introducing a new, uniform regulation for the Union of South Africa, it sought to repeal only the legislation formerly applicable in the four provinces.⁵⁰

Finally, an argument might be made that the common law of crimes extinguished the customary-law counterpart, but, for this argument to succeed, the spoor law must be classified as a criminal matter. While the inclusion of the law in a penal code implies that all of its elements are criminal, we have seen above that most are civil. In fact, if we take the 1886 Transkei Penal Code as a fairly typical statement of customary law at the time, it appears that only section 201 reflected an unambiguously criminal offence: the laying of false spoor.⁵¹ Indeed, the courts' interpretation of the spoor law provides the most telling evidence in favour of its civil nature.⁵²

Classification of rules as civil or criminal, however, raises an awkward problem, as yet not considered by the courts: the conflict of personal laws. Is it the task of common or customary law to determine whether a rule is civil or criminal? No one has given serious thought to this question, at least in so far as it concerns the classification of crimes and delicts. As a matter of practice, it seems most likely that the courts have simply used the laws with which they are most familiar in order to classify. Accordingly, traditional courts have used customary law and the magistrates' courts and High Court the common law.

⁴⁸ When section 211(3) is read in conjunction with other provisions in the Constitution of the Republic of South Africa, 1996, notably, s39(2), it can be taken to mean that customary and Roman-Dutch law are now equal partners as the general laws of the land. See *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at paras [365]ff.

⁴⁹ Act 57 of 1959.

⁵⁰ See the Schedule to the Stock Theft Act 57 of 1959.

⁵¹ Although s 200 1(3) of the Transkei Penal Code – the obligation on neighbours to assist the pursuers of stolen stock – could also be considered penal, but the courts interpreted it as civil. Indeed, s 200 1(5), which obliged the head of a homestead to take up pursuit of missing stock, was matched by a duty to make compensation for failure to comply.

⁵² *Sigidi v Mqezana* 2 NAC 94 (1910). See, too, the cases cited in footnote 6 regarding the evidence necessary to prove breach of the spoor law.

It must also be appreciated that, from the initial decision to subject a cause of action to customary or common law, logic compels application of the same law to any associated issues.⁵³ In consequence, if a claim is governed by customary law, then those parts of the spoor law regulating proof are also applicable. Hence, tracing spoor to a homestead would be sufficient circumstantial proof, on a balance of probabilities,⁵⁴ of the identity of the thief. There would be no need to lead further evidence to establish that fact beyond a reasonable doubt.⁵⁵

The problems of classification and conflict of laws are compounded by a third problem: the ambivalence of customary law on matters of crime and delict. Customary law does not always distinguish between the two, but, if it chooses to, will not necessarily do so in the same way as the common law.⁵⁶ Theft of goods, for instance, is generally considered delictual, but the theft of livestock may also be criminal.⁵⁷ Shaka, for example, decided to make cattle stealing a special case, so he decreed that it was an offence punishable by death.⁵⁸

The common law, on the other hand, requires a clear separation of civil and criminal matters, because this distinction has an important bearing on the subsequent legal procedure. In the first place, the classification of wrongdoing as a crime may determine which court will have jurisdiction to hear the matter. In the second place, the common law prescribes an elaborate set of rules for criminal prosecutions, all designed to protect the accused. In the third place, the common law lays down a higher standard of proof for crimes than for delicts.

As indicated above, the spoor law was enacted as a provision in a penal code, suggesting that all its component parts should be classified as criminal. The courts, however, treated s 200 of the 1886 Transkei Code as the basis for a civil claim,⁵⁹ and this approach was borne out

⁵³ See further TW Bennett *Application of Customary Law in Southern Africa* (1985) 113.

⁵⁴ *The Queen v M'Balo* (1891-1892) 9 SC 379 at 380.

⁵⁵ In *Jikisilei v Rex* 1909 23 EDC 289, it was noted that evidence of spoor may be enough to attract civil liability under section 200, but would not be enough for a criminal conviction. See also *Tyaliti and Others v Sindiwe* 1 NAC 158 (1907); *Gontsana and Others v Konzana* 1 NAC 213 (1908) and *Sigidi v Mqezana* 2 NAC 94 (1910).

⁵⁶ See JMT Labuschagne & JA Van den Heever 'Die oorsprong en onderskeid tussen fenomene misdaad en delik in primigene regstelsels' (1991) 12 *Obiter* 80 at 95 and RB Mqoke 'Customary Law of Delict and the Bill of Rights' (1992) 25 *De Jure* 462 at 467.

⁵⁷ NJJ Olivier et al *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* (1981) 362.

⁵⁸ Krige op cit (n2) 229.

⁵⁹ *The Queen v M'Balo* (1891-1892) 9 SC 379 at 380. See, too, *Sigidi v Mqezana* 2 NAC 94 (1910); *Gontsana and Others v Konzana* 1 NAC 213 (1908) and *Zwaartbooi v Gunjwe and Others* 3 NAC 267 (1912).

by the more recent 1983 Transkeian Code.⁶⁰ Thus, only section 201 of the 1886 Code (laying a false spoor) was deemed a criminal offence. The final provision on the spoor law, section 202, was considered procedural, because it prescribed the method to be followed for establishing the civil claim in s 200.

In summary, a careful reading of the customary spoor law – whether in the official or living versions of that law – will show that the nature of its component parts as civil or criminal wrongs is far from obvious. The better interpretation suggests that, with the exception of laying a false spoor, the various wrongs are civil in nature. It follows that, apart from this one instance, the question whether customary law has survived colonial occupation is redundant.

3. The constitutionality of the spoor law

Even if the spoor law is still available to prosecutors and the owners of missing stock, its validity could nonetheless be challenged as a violation of the Bill of Rights on two grounds: the effect of imposing collective liability and reversing the onus of proof.

a) Collective liability

Collective liability means that individuals are held liable for an offence even if they were not at fault and had not committed any wrongful act. As an instance of this principle, one aspect of the spoor law is a prime example:⁶¹ the possibility of the head of a homestead and his neighbours being held liable to compensate the owner of stolen stock, simply because the tracks of the stock led to the vicinity of the homestead.⁶²

On the face of it, the idea that individuals can be held liable for wrongdoing for which there is no clear proof that they were responsible seems unjust. Admittedly, the spoor law does not violate any particular section of the Bill of Rights, but it could be argued that collective liability is contrary to public policy.

In her analysis of the customary law of wrongs, however, Sally Falk Moore explains collective liability in terms which suggest that it is

⁶⁰ Section 152(c) of the Transkei Penal Code Act 9 of 1983 (Transkei), which, it should be noted, is not cast in the peremptory terms of a crime.

⁶¹ Koyana op cit (n1) 57; Krige op cit (n2) 223; Whitfield op cit (n6) 481 and *Zwaartbooi v Gunjwe and Others* 3 NAC 267 (1912).

⁶² Thus the spoor law was said to be 'the distinctive privilege conferred upon the owner of stolen stock ... quite unknown to the common law and [with] no parallel except in the collective responsibility under the old feudal law': *Zwaartbooi's* supra (n61).

less threatening to (Western) ideas of justice than might superficially appear.⁶³ To understand the customary system of liability, we need to be aware of the way in which that law deals with property. All economically significant items, especially those concerned with production, such as land and livestock, are administered by the most senior member of a family. Because individuals have no control over this property, they have no means of satisfying their debts. Creditors must look to the head of the family for payment.⁶⁴ While this situation might seem to place an unfair burden on one person, it ensures compensation for the victim of a wrong.⁶⁵

Similar rules can be found in the common law, in the form of vicarious liability and a parent's liability for the misdeeds of minor children. In both instances, persons who committed no wrongful act are obliged to compensate the complainant. In the case of vicarious liability, for example, employers are considered best equipped financially to put right any damage done by their employees.⁶⁶ On these grounds, the doctrine has been held to be compatible with the Bill of Rights.⁶⁷

Similar reasoning underlies parental liability for the delicts of minor children, and, as it happens, this form of liability has a close parallel with the customary-law rule of 'kraalhead' liability.⁶⁸ The latter is based on both kinship and co-residence within a homestead,⁶⁹ whereby the head of a family or homestead is responsible for the wrongs of all

⁶³ See, in this regard, the useful article by SF Moore 'Legal liability and evolutionary interpretation: some aspects of strict liability, self-help and collective responsibility' in M Gluckman (ed) *The Allocation of Responsibility* (1972) 54ff.

⁶⁴ MW Prinsloo *Die Inbeemse Strafreë van die Noord-Sotho* (1978) 9; MW Prinsloo *Die Inbeemse Administratieweë van 'n Noord-Sothostam* (1981) 92 and *Inbeemse Publiekreg in Lebowa* (1983) 177 and AC Myburgh *Indigenous Criminal Law in Bophuthatswana* (1980) 56-57.

⁶⁵ And the head of the family could no doubt exact suitable reparation from the perpetrator of the offence.

⁶⁶ And are considered responsible for introducing new sources of risk into society by engaging in their business ventures: *RH Johnson Crane Hire (Pty) Ltd v Grotto Steel Construction (Pty) Ltd* 1992 (3) SA 907 (C) at 908. See, too, JM Potgieter 'Preliminary thoughts on whether vicarious liability should be extended to the parent-child relationship' (2011) 32 *Obiter* 189 at 191.

⁶⁷ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

⁶⁸ See *K's case* supra (n67) at para [24] (fn30). O'Regan J did not take the point further, but family head liability is a broader concept. See TW Bennett *Customary Law in South Africa* (2004) 325-327.

⁶⁹ In either case, it is assumed that the family head has control over the family estate and all persons resident within the homestead: Olivier op cit (n57) 418-434; C Rautenbach, JC Bekker & N Goolam *Introduction to Legal Pluralism in South Africa* (2010) 81-82, and see TW Bennett *A Sourcebook of African Customary Law for Southern Africa* (1991) 329-330, 341-343 and 351-357.

those under his power.⁷⁰ The common-law rule is distinguishable in so far as it requires fault on the part of the parent or an employer-employee type of relationship before the parent can be held liable for damage caused by the child.⁷¹

By placing liability on the person most able to make compensation, the spoor law is akin to these common-law rules, but it differs in one critical respect: not only are the persons held liable innocent of any wrongdoing, but they may also have had no relationship with the offenders apart from geographic proximity. In particular, the spoor law differs from the parent-child situation by extending liability far beyond the realm of immediate kin to include all inhabitants of a homestead,⁷² and indeed even neighbouring homesteads.⁷³

Vicarious and parent-child liability are concerned with delicts. When we turn to look at collective liability within the context of criminal acts, different issues are raised. Here, the international human rights code voices strong objection to the idea of collective *punishment*. This idea, with its connotations of the Nazi law of *Sippenhaft*,⁷⁴ is prohibited under both customary international law⁷⁵ and the Rome

⁷⁰ *Peter v Sango and Mrwebi* 1972 BAC (S) 185 at 187. See, to *Skenjana v Guza* 1944 NAC (C&O) 102 and *Mblokonyelwa v Ngoma* 1950 NAC (S) 197. Hence, kraalhead liability arises not only from control of property but also from the disciplinary powers which the head of a homestead is expected to exercise over his subordinates: TW Bennett 'The status of children under indigenous law: the age of majority' in AJGM Sanders *Southern Africa in Need of Law Reform* (1980) 18 at 19. See, too, RB Mqeke 'Can we find a suitable basis for the kraalhead's delictual liability in respect of the minor inmates of his kraal in African law' (1981) 98 *SALJ* 266 at 266 and 270.

⁷¹ *April v Pretorius* 1906 TS 824 and *De Beer v Sergeant* 1976 (1) SA 246 (T). See, in general, Potgieter op cit (n66) 193 and JM Potgieter 'Aanspreeklikheid van ouers vir skade veroorsaak deur hul minderjarige kinders?' (2008) 71 *THRHR* 331.

⁷² The reason for this is because litigation is between groups and not individuals: JMT Labuschagne & JA Van den Heever 'Gedingsaanvang en die aanmeldingsprosedure in die inheemse deliktereg' in PD De Kock & JMT Labuschagne (eds) *Festschrift J C Bekker* (1995) 95 at 99.

⁷³ Whitfield op cit (n6) 481-482.

⁷⁴ See, for example, Robert Loeffel *Sippenhaft in the Third Reich: analysing the spectre of family liability punishment against opposition in Nazi Germany 1933-1945* (2004) University of New South Wales.

⁷⁵ Common article 3(b) of the 1949 Geneva Conventions for the Protection of War Victims and the 1977 Additional Protocol II. Moreover, article 33 of Geneva Convention IV relative to the Protection of Civilian Persons in Time of War provides that: 'No protected person may be punished for an offense he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited' A similar provision appears in Article 75(2)(d) of Additional Protocol II Rule 103.

Statute constituting international criminal law.⁷⁶ These provisions – whether treaty or custom – form part of South African law.⁷⁷

Thus, if application of the spoor law were to result in the imposition of a criminal penalty on individuals who did not actually commit stock theft, it could be considered invalid. In this respect, however, we should compare crimes of participation and the doctrine of common purpose, both of which are regarded as acceptable means for attributing criminal liability under the common law. In *S v Thebus and Another*,⁷⁸ although the Constitutional Court carefully scrutinized common purpose, it held that the doctrine was compatible with the Bill of Rights.⁷⁹

Common purpose is conceived in terms of the proximity of an offender (both factually and legally) to the commission of a crime.⁸⁰ It denotes an 'active association and participation in a common criminal design with the requisite blameworthy state of mind'.⁸¹ Each party then bears responsibility for conduct falling within the common design, but committed by only one member of the group.⁸² Liability arises in two situations: a prior agreement⁸³ or an active association at the time the crime is committed.⁸⁴ The effect of common purpose is

⁷⁶ See article 25 of the Rome Statute of the International Criminal Court (2002) dealing with joint liability and common purpose, both of which demand the intentional wrongdoing of the perpetrator (article 25(d)).

⁷⁷ In terms of section 232 of the Constitution of the Republic of South Africa Act, 1996, they are deemed part of South African common law if they are custom, and, in terms of sections 231(4) and (5), treaties may be incorporated into South African law. See, too, the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

⁷⁸ 2003 (6) SA 505 (CC) at para [50].

⁷⁹ The doctrine is derived from English law (JM Burchell *Principles of Criminal Law* 3ed (2005) 575), and entered South African law via section 78 of the Transkei Penal Code 24 of 1886 (Cape). See, too, *S v Nzo* 1990 (3) SA 1 (A) at 14.

⁸⁰ *Nzo's* case supra (n79) at 16 and Burchell op cit (n79) 576.

⁸¹ *S v Thebus and Another* 2003 (6) SA 505 (CC) at para [19]; *S v Ngobozi* 1972 (3) SA 476 (A) and *S v Mgedezi* 1989 (1) SA 687 (A) at 705–706.

⁸² Burchell op cit (n79) 570.

⁸³ In cases where there was no prior agreement, the party held liable in terms of the common purpose must have been present at the scene of the crime, aware that it was being committed, intending to be in common cause with the others, and manifesting a 'shared common purpose' with the perpetrators by associating with them: *S v Thebus and Another* 2003 (6) SA 505 (CC) at para [19].

⁸⁴ *S v Thebus and Another* 2003 (6) SA 505 (CC) at para [19]; *Magmoed v Janse van Rensburg and Others* 1993 (1) SA 777 (A) at 810G and Burchell op cit (n79) 55. The usual elements of a crime must be proved, namely, *mens rea* (*S v Mgedezi* 1989 (1) SA 687 (A) at 705–706) and unlawful conduct (Burchell op cit (n79) 572–573).

to dispense with the requirement of causation for establishing criminal liability.⁸⁵

The spoor law and common purpose have certain points of similarity. Neither requires proof of a causal relationship between the offender's conduct and the crime; no prior agreement is necessary, merely a passive association; and both rules infringe the presumption of innocence. Even so, the spoor law can be distinguished. Its scope is even broader than that of common purpose: notwithstanding evidence of the defendant's refusal to participate in a theft, he can be held liable. Mere residential association is sufficient. And, more seriously, the spoor law amounts to a reversal of the onus of proof (for which see below).⁸⁶

What is more, the doctrine of common purpose not only treats participants as co-perpetrators, rather than accomplices,⁸⁷ but also requires evidence of a common design, which entails proof beyond a reasonable doubt that, while one party in the group committed the unlawful act, other identifiable perpetrators were of the same intent. In comparison, the spoor law holds the group liable for a *possible* crime committed by one of its members: no fault needs to be proved and no actual offender (or act of theft) needs to be identified.⁸⁸

Participation in a crime is another common-law method for attributing liability to members of a group. According to this principle, each participant linked to a crime, whether as perpetrator, co-perpetrator, accomplice or accessory before and after the fact, may be held liable alongside the principal offender.⁸⁹ In this case, the spoor law presents significant differences, since the inmates of a homestead need commit no act at all in becoming associated with the crime. Liability is based solely on being the inmate of a neighbouring homestead.

In summary, the collective responsibility element of the spoor law is clearly incompatible with public policy in matters of crime, but in matters of delict it is probably acceptable. In this event, the customary-

⁸⁵ *Thebus's case* supra (n84) at para [34]: 'Provided the accused actively associated with the conduct of the perpetrators in the group that caused the death and had the required intention in respect of the unlawful consequence, the accused would be guilty of the offence.'

⁸⁶ Which is not the case with the doctrine of common purpose: *Thebus's case* supra (n84) at para [43].

⁸⁷ Burchell op cit (n79) 582

⁸⁸ Lastly, in the case of common purpose, remote parties can defend themselves by claiming mistake as regards the sequence of events (Burchell op cit (n79) 156), whereas, in the case of spoor law, the only defences are a reasonable explanation or proof that the spoor continues beyond the homestead.

⁸⁹ In South African common law, where 'more than one person may be involved in the commission of a crime, the law assigns liability to such persons': Burchell op cit (n79) 570.

law conception of spoor law will raise no cause for concern, since the sanction for the offence is generally compensation, not a penalty.

b) Proof and the reverse onus of proof

According to the common law and s 35(3)(h) of the Bill of Rights, defendants in criminal cases are presumed innocent. The prosecution therefore bears the onus of proving their guilt, which it must do beyond a reasonable doubt. The burden of adducing evidence in rebuttal (*weerleggingslas*) may shift to the accused, depending on the measure of proof of the case,⁹⁰ but this rebuttal should not amount to a reverse onus.⁹¹

The doctrine of common purpose which, as we have seen, has certain similarities to the spoor law, absolves the prosecution from its duty to prove all the elements of a crime,⁹² and so, *prima facie*, would seem to be in conflict with the Bill of Rights. In *S v Thebus and Another*,⁹³ however, the Constitutional Court decided that common purpose did not amount to a violation of the rights to dignity, freedom and security, nor did it amount to an infringement of the presumption of innocence.⁹⁴ The Court said that by relieving the prosecution of having to prove a causal link between the conduct and the unlawful consequence, it assisted in crime control, and thereby operated in the interests of public policy.⁹⁵ Insistence on the requirement of causality in common-purpose crimes would hamper the effective prosecution of collaborative 'criminal enterprises'.⁹⁶

The spoor law is an obvious case of reversing the onus of proof, and thereby violating the presumption of innocence, because it provides that, once tracks are traced to a homestead, the onus then lies on the head of that establishment to show what happened to the missing livestock. Objections to the rule, however, apply only to criminal matters, and, in so far as the spoor law results in civil liability it might well pass constitutional scrutiny. Indeed, the argument for retaining the rule is strengthened by the same policy grounds underlying the doctrine of common purpose: it will serve the useful purpose of alleviating the plaintiff's burden to prove all elements of an endemic offence in rural areas.

⁹⁰ PJ Schwikkard & SJ Van der Merwe *Principles of Evidence* 3ed (2009) 499-502.

⁹¹ Schwikkard & Van der Merwe op cit (n90) 517-521.

⁹² Burchell op cit (n79) 580.

⁹³ *S v Thebus* supra (n84).

⁹⁴ *S v Thebus* supra (n84) at paras [36] and [43].

⁹⁵ *S v Thebus* supra (n84) at para [37].

⁹⁶ *S v Thebus* supra (n84) at para [34].

4. Conclusion

The purpose of this article was to determine whether the spoor law still existed and whether it was constitutionally valid. No absolute answer can be given to the question, however, principally because the description of the spoor law as a 'law' gives the misleading impression that it is a single offence. The 'law' is better described as a collection of rules, only one of which constitutes a crime: the laying of false spoor. The others constitute delicts or methods for determining liability.

Although not mentioned for many years in the reported cases, the spoor law was not formally extinguished by imposition of the colonial system of criminal law or subsequent legislation on stock theft. In fact, it still maintains a precarious position in the Transkei Penal Code,⁹⁷ and it clearly survives in the official version of customary law. Moreover, in spite of the long silence on the subject, spoor law may well be a rule of the living customary law. We simply have no research indicating whether it is still in use.

Whatever its exact formal status, however, the customary-law version of spoor law stands to be applied by any South African court in terms of s 211(3) of the Constitution and the Law of Evidence Amendment Act.

Unlike the spoor law, the practice of stock theft can be in no doubt. According to a statement put out by the South African Police Service, it is described as 'a priority crime in most provinces of South Africa'.⁹⁸

As its previous record indicates, the spoor law was regarded as an effective deterrent on stock theft, and, because it spread responsibility for crime control throughout local communities, the law was enthusiastically embraced by the colonial authorities. On these grounds, it would seem as if the spoor law still has a useful role to play, especially when it is borne in mind that groups rather than by individuals could be responsible for the evil it was designed to combat. As a SAPS bulletin from KwaZulu-Natal indicates, stock theft is now the subject of organised crime.

'There appears to be a chain of stock theft perpetrators that begins with members of the community from where the livestock is stolen, and ends with persons who assist with the final sale of stolen stock and the purchasers themselves. Stock traders and speculators are rife in the province and operate in a largely unregulated manner. Some speculators are believed to have 'runners' who regularly steal for them. Local criminals provide the critical

⁹⁷ Although, in so far as the Transkei and the notion of Transkeian citizenship have been abolished, the law will be open to constitutional review.

⁹⁸ South African Police Service 'Stock Theft' (22 June 2008), available at http://www.agriwiki.co.za/index.php?title=Stock_theft, accessed on 21 March 2012.

link that enables organised individuals and groups to enter into a location and steal livestock.⁹⁹

In collaborative crimes of this nature, when it is difficult to prove participation, the Constitutional Court was willing to uphold a method of crime control similar to spoor law, the common-law doctrine of common purpose.¹⁰⁰

Notwithstanding the social value of spoor law, however, can all aspects of it be supported in today's constitutional democracy? One is clearly unobjectionable: the criminal offence of laying false spoor. Others may prove to be more problematic: the presumption of liability based on the existence of spoor in a neighbourhood; the consequent duty to assist in the search for missing stock; the imposition of liability to compensate the stock owner if assistance or explanation is not forthcoming and, perhaps most important, implicit right of self-help.

South African authorities have an understandably ambivalent attitude towards the principle of self-help. While it can all too easily degenerate into vigilantism,¹⁰¹ a criticism that was levelled at the colonial application of spoor law,¹⁰² the prevalence of stock theft is such that Police Services are encouraging communities to play a more active part in combating stock theft.

Amakhosi [in KwaZulu-Natal] need to be trained in a number of areas, including in relation to the keeping of records of stock theft cases reported to them, stock marking and stock theft prevention techniques. They must also take action against stock owners who allow their livestock to wander unattended and must encourage communities to erect and maintain adequate fencing.¹⁰³

Indeed, collaboration between rural communities and law enforcement authorities has been a live issue since colonial times.¹⁰⁴

⁹⁹ KwaZulu-Natal Department of Community Safety & Liaison 'Stock Theft in Kwazulu-Natal' (2008) KZN DCSL 16, available at <http://www.kzncomsafety.gov.za/Portals/0/Documents/Research/STOCK%20THEFT%201%20PDF.pdf>, accessed on 21 March 2012.

¹⁰⁰ *S v Thebus* supra (n84) at para [40]: 'misdeeds strike more harshly at the fabric of society and the rights of victims than crimes perpetrated by individuals'. See, to *S v Safatsa and Others* 1988 (1) SA 868 (A) at 900 and Burchell op cit (n79) 579.

¹⁰¹ M Shaw 'South Africa: Crime in transition' (1996) 9 *Terrorism and Political Violence* 156-175.

¹⁰² Mostert op cit (n20) 450; Davenport & Saunders op cit (n21) 134.

¹⁰³ KwaZulu-Natal Department of Community Safety & Liaison op cit (n99) 23.

¹⁰⁴ Hence such provisions as Section 9 of the Stock Theft Act 57 of 1959 provides that: 'whenever any owner, lessee or occupier of land, reasonably suspects that any person has ... any livestock ... in regard to which an offence has been committed, search without warrant If he thereupon finds that any livestock ... in regard to which he reasonably suspects an offence to have been committed, he may arrest without warrant such person ... and shall as soon as possible convey such person and the livestock ... so found ... to a police station.'

Arguably, the spoor law can find a useful place in this cooperative enterprise. The presumption that tracks leading to a homestead indicate the person responsible for the theft of stock considerably eases the burden of proving the offence. Because no criminal liability ensues, there can be no constitutional objection to this aspect of the spoor law. The duty to assist and the consequent imposition of liability to do so, however, requires further scrutiny. No fault liability of this nature is accepted in South African law – as, for instance, in cases of vicarious and parental liability – but it is an exception to the rule, and must be supported by sound social and economic principles.¹⁰⁵

The spoor law goes further in spreading the net of liability: the defendant commits no wrongful act – apart from a failure to assist in a search – and has no relationship at all with the actual offender. In fact, as understood in terms of s 200 of the Transkeian Penal Code, the rule may render the heads of all homesteads in the vicinity to which the spoor was traced liable to pay damages.¹⁰⁶

In the past, of course, the notion of collective liability made sense, because the heads of homesteads, by drawing on the resources of all those living under their control, were the persons best able to make reparation for wrongdoing. But it may well be asked whether the spoor law is appropriate in today's society. The answer would depend on whether we are considering urban or rural conditions. While the former is a loose aggregation of individuals, relationships in rural communities are still relatively close knit.

It is in this regard that the spoor law displays its principal value: the emphasis of civic responsibility for the doings of neighbours. When people are encountered passing through a district with cattle, they must be questioned, otherwise the local inhabitants may be held liable for stock losses. Such thinking is consonant with *ubuntu*,¹⁰⁷ a doctrine that the courts have taken from the Preamble to the Interim Constitution¹⁰⁸ and launched into the mainstream of South African

¹⁰⁵ In the law of delict, for instance, an individual will not be held liable for a failure to prevent damage in the absence of a clear legal duty to act, such as situations arising from control of a dangerous object or serving in a specific occupation. See the dictum of the court in *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) at 1054: 'Society is hesitant to impose liability in law for, as it is sometimes put "minding one's own business".'

¹⁰⁶ Olivier *et al* op cit (n57) 49 submit that it is incorrect to refer to the liability of the family head, because there is no separate and independent liability: the correct description would be the co-liability (*in solidum* and separate) of the family head with others involved.

¹⁰⁷ See *S v Makwanyane* 1995 (3) SA 391 (CC) at paras [224] and [308] and See CJ Roederer 'The constitutionally inspired approach to vicarious liability in cases of intentional wrongful acts by the police: one small step in restoring the public's trust in the South African police services' (2005) 21 *SAJHR* 575 at 593.

¹⁰⁸ Act 200 of 1993.

law. *Ubuntu* requires people to take an interest in the problems of their neighbours and share in their responsibilities.¹⁰⁹

Moreover, with improved methods of crime detection, the value of the presumption built into the spoor law in identifying stock thieves is questionable.

¹⁰⁹ See A Shutte *Ubuntu: an ethic for a new South Africa* (2001) 52-53.